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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

RODERICK MAGADIA, individually and on
behalf of all those similarly situated,

Plaintiff,

v.

WAL-MART ASSOCIATES, INC., a
Delaware corporation; WAL-MART
STORES, INC., a Delaware corporation;
and DOES 1 through 50, inclusive,

Defendants.

Case No.: 5:17-cv-00062-LHK

**DEFENDANTS' NOTICE OF
MOTION AND MOTION FOR
DECERTIFICATION OF THE MEAL
PERIOD CLASS; MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: December 20, 2018
Time: 1:30 p.m.
Courtroom: 8, 4th Floor

1 TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on December 20, 2018 at 1:30 p.m., before the
3 Honorable Lucy H. Koh, District Judge in Courtroom 8 – 4th Floor of the United States
4 District Court for the Northern District of California, San Jose Division, located at 280
5 S. First Street, San Jose, California 95113, defendants Wal-Mart Associates, Inc. and
6 Wal-Mart Stores, Inc. will and hereby do move this Court for an Order decertifying the
7 Meal Period Class.

8 The motion is based upon the accompanying Memorandum of Points and
9 Authorities, the declarations and exhibits accompanying this motion, the pleadings,
10 orders, and other records on file with the Court, and any other matters that the parties
11 may submit or the Court may deem appropriate.

12
13 Dated: July 26, 2018

DUANE MORRIS LLP

14
15 By: /s/Aaron T. Winn
16 Aaron T. Winn
17 Jennifer A. Kearns
18 Allegra A. Jones
19 Attorneys for Defendants
20 Wal-Mart Associates, Inc. and
21 Wal-Mart Stores, Inc.
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INTRODUCTION

Plaintiff's Meal Period Premium claim challenges the rate at which Walmart pays its meal period premiums.¹ But before getting to that question, "Plaintiff must establish that Walmart was legally obligated to pay a meal period premium." (*See* Class Certification Order, ECF No. 84 at 13.) This would not be difficult, Plaintiff's counsel argued when seeking certification, because Walmart investigates each meal period exception (*i.e.*, a late, short or missed meal). (Plaintiff's Reply, ECF No. 79 at 9-10.) These investigation documents, Plaintiff argued, would allow the Court to readily identify which associates were legally entitled to a meal period premium. *Id.* Based on this assumption, the Court certified the Meal Period Premium Class. (Class Certification Order, ECF No. 84 at 12-16, 22.)

To test the theory that the investigation documents would be a reliable tool for determining who was entitled to a meal period premium, the parties pulled meal period investigation worksheets from 50 California Walmart stores. (Declaration of Aaron Winn ("Winn Decl."), ¶3.) These documents show that the meal period investigation process is not a reliable and accurate tool for identifying who was *legally* entitled to a meal period premium.

In fact, for several meal period exceptions, there is no corresponding investigation worksheet. (Declaration of Todd Stokes ("Stokes Decl."), ¶ 7.) When there is a worksheet, it sometimes fails to identify any reason for the meal period exception. (Stokes Decl., ¶ 4 (Exs. 1, 2, 3), ¶ 5.) When there is a worksheet, and it *does* include the associate's explanation, the explanation is sometimes so short, muddled, or oblique that it would be extremely difficult (if not impossible) to readily determine

¹ As outlined in Walmart's concurrently filed motion for summary judgment, Walmart's practices comply with Labor Code section 226.7 because the "regular rate of compensation," as used in section 226.7, is different than the "regular rate of pay," which is used elsewhere in the Labor Code. *See e.g., Brum v. MarketSource, Inc.*, No. 2:17-cv-241-JAM-EFB, 2017 WL 2633414 (E.D. Cal. June 16, 2017) (rejecting challenge to meal period premium rate because "the legislature's choice to use the word 'compensation' instead of 'pay' [is] meaningful").

whether there was an actual meal period violation. This is not particularly surprising because (1) the worksheet is designed to identify only *the associate's* explanation for the exception; (2) the worksheet does not ask the manager to investigate or confirm the truth of the associate's allegation; and (3) Walmart does not use the worksheet to determine whether an exception triggered a *legal* obligation to pay a premium.

Because the meal period investigation worksheets do not confirm whether an associate was legally entitled to a meal period premium, the “coding” of the worksheets in the Exception Management System (EMS) is equally unhelpful for determining *actual* meal period violations. For example, some meal period exceptions were coded as “Manager Directed” even when the associate's explanation—*e.g.*, “I lost track of time”—does not remotely suggest a “Manager Directed” event. (Stokes Decl., ¶ 4 (Ex. 4), ¶ 5.) In short, post-certification discovery shows that Walmart's investigation records *cannot* be used to readily or reliably identify who was legally entitled to a meal period premium. As a result, the Court should decertify the Meal Period Premium Class.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Court certifies the Meal Period Premium Class.

Plaintiff's reply brief in support of their class certification motion argued that the Court could easily use Walmart's own records to determine who was legally entitled to a meal period premium because Walmart supposedly investigates and documents “every single meal period violation.” (ECF No. 79 at 9.) As a result, Plaintiff explained that he would simply “accept the truth of Defendants' meal period reports and limit the meal period premium rate claim to only those violations which Defendants confirmed.” (*Id.*)

Based on Plaintiff's theory, the Court certified the Meal Period Premium Class. (ECF No. 84 at 12-16, 22.) The Court defined the Meal Period Premium Class as all current and former hourly California Walmart retail employees who were paid any meal period premium [regardless of the reason] in the same period that they received a non-discretionary bonus. (*Id.* at 22.)

B. Post-certification discovery

After the Court's certification order, the parties conducted extensive discovery. Among other things, Plaintiff took a 30(b)(6) deposition regarding Walmart's meal period investigation process and identified 50 California Walmart stores from which the parties pulled all relevant meal period investigation worksheets—the documents, Plaintiff argued, would allow the Court to easily determine which associates were legally entitled to a meal period premium.

1. Walmart's 30(b)(6) witness explains that the meal period investigation process does not confirm whether a meal period premium was legally owed.

Prior to class certification, Plaintiff's counsel deposed Walmart's Regional HR Director Todd Stokes. He was *not* designated as a 30(b)(6) witness for purposes of meal period investigations, and during his deposition, Walmart's counsel repeatedly objected that questions regarding the meal period investigation process exceeded the scope of the 30(b)(6) notice. Counsel explained that Stokes "is not prepared to testify on behalf of Walmart policy regarding [the meal period investigation process]." (Winn Decl. Ex. A, Stokes Dep., at 44:4-48:9.) And Stokes explained: "I don't know the actual, full process to speak fully on that." (Winn Decl. Ex. A, Stokes Dep., at 45:8-22.)

Despite Stokes' lack of familiarity with the investigation process, Plaintiff's counsel used his testimony *in their reply brief* to support their theory that determining who was legally entitled to a meal period premium would be easy because Walmart investigates each meal period exception.

After the Court granted class certification, Plaintiff noticed a separate 30(b)(6) deposition regarding Walmart's meal period investigation topics. This was necessary, of course, because Stokes was *not* familiar with the meal period investigation process and was *not* designated as a 30(b)(6) witness to discuss meal period investigations. The 30(b)(6) deposition regarding meal period investigations occurred on June 28, 2018. Walmart's 30(b)(6) designee was Victoria Moore.

1 Throughout Moore's deposition, Plaintiff's counsel confused and/or conflated
 2 several different internal procedures that relate to Walmart's meal period policy.² But
 3 to the extent the questioning allowed her to do so, Moore explained that Walmart's
 4 managers are expected to use a meal period investigation worksheet to document the
 5 *associate's* reason for the exception and then to enter worksheet data into Walmart's
 6 Exception Management System (EMS). (Winn Decl. Ex. B, Moore Dep. at 21:25-26:14;
 7 105:13-109:19.) The process that leads to the EMS data is *not* designed to determine
 8 whether an associate is actually entitled to receive a meal period premium. (Winn
 9 Decl. Ex. B, Moore Dep., at 21:25-26:14; 53:25-54:11.) Rather, Walmart pays California
 10 associates a meal period premium regardless of whether the associate completes the
 11 worksheet and regardless of the reasons (if any) an associate provides for the meal
 12 period exception. (Winn Decl. Ex. B, Moore Dep., at 21:25-26:14; 53:25-55:1.)

13 Moore also explained that the purpose of the meal period investigation process is
 14 limited to creating visibility into risk indicators for meal exceptions. (Winn Decl. Ex.
 15 B, Moore Dep., at 53:25-55:14; 57:12-58:20). It is not designed to confirm whether a
 16 meal period premium was legally owed or to verify whether the associate's story was
 17 true:

18 Q. . . . Is there a report that we could pull from the exception
 19 management system which has the conclusion after the investigation which
 20 confirms the reason code? If it's a valid reason code, is there a report that would
 be run that says "These reason codes have been confirmed"?

21 A. *There's no confirmation. The step that you say -- the step that you*
 22 *outline around confirmation, that step is not part of the process.*

23 (Winn Decl. Ex. B, Moore Dep., at 124:17-125:3) (emphasis added) (objection omitted).)

24 Rather, as the meal period investigation worksheet makes clear, the
 25 investigation process focuses on documenting the *associate's* reason for the exception.

26 ² Plaintiff's counsel also conflated the process in their class certification briefing, as the
 27 Court noted in its Order: "Plaintiff appears to conflate the Meal Exception Reports
 28 with the records that are generated by Wal-Mart's investigations into every reported
 meal exception. . . . [T]hese are two different things." (ECF No. 84 at 14 n.1.)

1 (Winn Decl. Ex. B, Moore Dep., at 21:25-26:14; 105:13-109:19; Stokes Decl., ¶ 4, Exs. 1-
2 24)

3 The first page of the two-page investigation worksheet directs the manager at
4 Step 1 to “[a]sk the associate and note in their words the reason a timely, full,
5 uninterrupted rest break or meal period was not taken.” (*See, e.g.*, Stokes Decl., ¶ 4,
6 Ex. 4.) The worksheet does *not* ask the manager to evaluate the associate’s story, opine
7 as to its credibility, or take any other action to “confirm” the associate’s allegation.

8 The second page asks the manager at Step 2 to identify whether *the associate*
9 alleges that he or she “voluntarily failed” or “involuntarily failed” to take a proper meal
10 break. (Stokes Decl., ¶ 4, Ex. 4.) As with Step 1, the investigation worksheet does not
11 ask or expect the manager to confirm or evaluate the associate’s allegation; it merely
12 asks the manager to document the allegation. The manager is then asked to remind
13 the associate of Walmart’s meal period policies and to provide appropriate coaching.
14 (Stokes Decl., ¶ 4, Ex. 4.)

15 The manager or a personnel associate (HR) then records in the EMS that the
16 associate completed the meal period investigation worksheet. (Winn Decl. Ex. B,
17 Moore Dep., at 68:15-70:7; 108:22-109:19.) This is done by matching, as closely as
18 possible, the associate’s allegations to one of the broad pre-populated EMS “reasons”
19 codes. (Winn Decl. Ex. B, Moore Dep., at 68:15-70:7). But when an associate alleges an
20 involuntary meal period exception, the worksheet directs the investigating manager to
21 select “Manager Directed – No Coverage/For Customer Support” *regardless of the*
22 *actual reason the associate gives for the meal exception.* (Winn Decl. Ex. B, Moore Dep.,
23 at 105:13-109:19; Stokes Decl., ¶ 4, Ex. 4.) The worksheet does not direct the
24 investigating manager to enter into the EMS the Step 1 reason the associate gave for
25 the meal exception. (Winn Decl. Ex. B, Moore Dep., at 105:13-109:19; Stokes Decl., ¶ 4
26 (Ex. 4), ¶ 8.)

1 **2. The 50-store sampling of meal period investigation**
 2 **worksheets.**

3 To test the premise that Walmart’s own documents could be easily used to
 4 determine who was *legally* owed a meal period premium, the parties pulled all relevant
 5 meal period investigation worksheets from 50 California Walmart stores, as selected by
 6 Plaintiff’s counsel. (Winn Decl., ¶ 3.) The meal period investigation worksheets exist
 7 only in hardcopy form and are located at the store where the associate works. (Stokes
 8 Decl. ¶ 3.) As outlined below, this sampling of investigation worksheets shows that the
 9 investigation process that leads to the EMS coding of meal period exceptions is focused
 10 on documenting associate allegations and identifying potential risks, but it does not
 11 determine (and cannot be used to easily or reliably determine) who is legally entitled to
 12 a meal premium. (*See generally* Stokes Decl., ¶ 4, Exs. 1-24.)

13 **ARGUMENT**

14 **A. When assessing a motion for decertification, the burden remains**
 15 **on the plaintiff to satisfy the requirements of Rule 23.**

16 “Even after a certification order is entered, the [Court] remains free to modify it
 17 in the light of subsequent developments in the litigation.” *Gen. Tel. Co. of Sw. v.*
 18 *Falcon*, 457 U.S. 147, 160 (1982); *see also* Fed. R. Civ. P. 23(c)(1)(C) (“An order that
 19 grants or denies class certification may be altered or amended before final judgment.”).
 20 “On a motion for decertification, the burden remains on the plaintiffs to demonstrate
 21 ‘that the requirements of Rules 23(a) and (b) are met.’” *Ries v. Ariz. Beverages USA*
 22 *LLC*, No. 10-01139 RS, 2013 WL 1287416, at *3 (N.D. Cal. Mar. 28, 2013) (quoting
 23 *Marlo v. United Parcel Serv., Inc.*, 639 F.3d 942, 947 (9th Cir. 2011)).

24 Here, the Court certified the Meal Period Premium Class under Rule 23(b)(3),
 25 finding that common issues “predominate over any questions affecting only individual
 26 members, and that a class action is superior to other available methods for the fair and
 27 efficient adjudication of the controversy.” Fed.R.Civ.P. 23(b)(3). When assessing
 28 predominance, the Court must first examine the substantive issues of Plaintiff’s claim

1 and then inquire into the proof relevant to each issue. *Gonzalez v. Officemax N. Am.*,
 2 No. CV 07-04839 JVS MLGX, 2012 WL 5473764, at *2 (C.D. Cal. Nov. 5, 2012). If the
 3 substantive issues require individual proof for each member's claims, making class
 4 treatment unmanageable, then class certification is inappropriate. *Id.*, at *6 (noting
 5 that "[w]ithout a viable method of common proof for evaluating the ability of [9,000]
 6 class members to take breaks as required by law, the Court will be mired in over
 7 [9,000] mini-trials regarding individual job duties and expectations," and stating that
 8 [t]he difficulties in managing such a wide-ranging factual inquiry persuade the Court
 9 that class treatment is not a superior method for resolution of the class members'
 10 potential [meal break] claims").

11 **B. Determining who was legally entitled to a meal period premium**
 12 **will require intensive individualized inquiries that will swamp**
 13 **the proceedings.**

14 Plaintiff promised the Court that Walmart's own documents would make it
 15 simple to determine who was legally entitled to a meal period premium. But post-
 16 certification discovery shows that Plaintiff's promise is illusory. Although Walmart
 17 asks its associates to provide a reason for meal period exceptions, the investigation
 18 process that leads to the EMS coding does not confirm whether the allegation is true or
 19 whether it would reasonably trigger a meal period premium. As a result, Walmart
 20 does not (and could not) rely on its investigation process to decide whether an associate
 21 was *legally* entitled to a meal period premium. Rather, out of an abundance of caution,
 22 Walmart pays a meal premium to every associate with a meal exception, regardless of
 23 the reason for the exception, and regardless of whether a meal period investigation is
 24 even undertaken. And because Walmart does not (and could not reasonably) use the
 25 meal period investigation process to determine who was *legally* entitled to a meal
 26 period, it cannot be used here as a proxy for legally determining liability.

1 **1. Walmart’s meal period investigation process does not**
2 **attempt to resolve any discrepancies regarding an**
3 **employee’s allegations or otherwise confirm (or reject) the**
4 **associate’s explanation for the exception.**

5 The meal period investigation process that leads to the EMS coding is not
6 designed to adjudicate conflicting stories regarding meal period exceptions or to make
7 determinations regarding the *actual* reason for a meal period exception. (Winn Decl.
8 Ex. B, Moore Dep., at 124:5-125:18.) Instead, the process merely documents (1) the
9 *associate’s* reason (if any) for the exception and (2) the associate’s (*not Walmart’s*)
10 allegation regarding whether the meal exception was voluntary or involuntary. (*See,*
11 *e.g., Stokes Decl., ¶ 4, Ex. 4.*) There is no part of the meal period investigation process
12 that either confirms or rejects the reason the associate provides for the meal exception.
13 (Winn Decl. Ex. B, Moore Dep., at 124:5-125:18.)

14 Walmart does not instruct managers to conduct a thorough interview of the
15 associate to gather details regarding the circumstances that led to the meal exception.
16 (Stokes Decl., ¶ 4, Ex. 4.) Indeed, because the conversation with the associate may
17 occur more than a week after the meal period exception, the associate sometimes does
18 not recall why the exception occurred. (Stokes Decl., ¶ 4, Ex. 5 (associate said “I don’t
19 remember” when asked at Step 1 the reason for not taking a proper meal break).) The
20 investigating manager is not instructed to ask the associate follow up questions,
21 interview other witnesses, review relevant documents or video footage, reconcile
22 conflicting statements or evidence, engage in further fact-finding or otherwise
23 challenge what the associate says regarding the reason for the meal exception. (Winn
24 Decl. Ex. B, Moore Dep., 60:14-61:20; Stokes Decl., ¶ 4, Ex. 4.) In terms of the
25 investigation process that leads to the EMS coding, the investigating manager is a
26 mere scribe (and often, not even that, as the associate may personally write the reason
27 for the meal exception in his or her own words and handwriting). (Winn Decl. Ex. B,
28 Moore Dep., at 42:1-43:8; *see also* Stokes Decl., ¶ 4, Ex. 4, for an example of a Step 1
 explanation written in the first person, in the associate’s handwriting).)

1 Because Walmart's meal period investigation process primarily documents an
2 associate's allegations about the reason for a meal exception, the investigating
3 manager does not necessarily ask the associate's supervisor for his or her side of the
4 story, even when the associate alleges that he or she "involuntarily failed" to take a
5 proper meal period. For example, because Everett Arcement alleged that he
6 "involuntarily failed" to take a proper meal break on January 13, 2013, his meal
7 exception was coded "Manager Directed" even though his supervisor did *not* participate
8 in the investigation. (See Stokes Decl., ¶ 4, Ex. 6, which shows no Step 3 signature for
9 the associate's supervisor.) That "Manager Directed" was selected without his
10 supervisor's involvement is especially concerning since his Step 1 explanation provides
11 no indication that his manager directed him to not take a proper meal period. (*Id.*) To
12 the extent an associate claims that a Walmart supervisor prevented the associate from
13 taking a proper meal break, Walmart is entitled to present testimony from the
14 supervisor and other evidence to demonstrate that the associate had an opportunity to
15 take a proper meal break. Using Walmart's EMS data to prove Plaintiff's class claims
16 denies Walmart of its right to tell its side of the story, which was not necessarily
17 captured by the meal period investigation process.

18 Because the investigation process that leads to the EMS coding involves
19 documenting associate allegations (in their own words), not engaging in fact-finding
20 investigations regarding the circumstances of each meal exception, showing that
21 Walmart actually prevented any class member from taking a proper meal break would
22 require highly individualized fact-finding to determine *why* each class member failed to
23 take a proper meal period.

24 **2. Meal period investigation data cannot serve as the basis for**
25 **making any reliable determination regarding who was**
26 **legally entitled to a meal period premium.**

27 The investigation worksheets produced by Walmart show that the investigations
28 are not reliable for purposes of determining whether Walmart prevented an associate
from taking a proper meal period. Because the investigation worksheets are the only

1 data point for the codes entered into the EMS system, the EMS data is no more reliable
2 that the spotty information contained in the worksheets. (Winn Decl. Ex. B, Moore
3 Dep., at 68:15-70:7.) Moreover, the investigating managers do not necessarily enter
4 the EMS coding themselves. (Winn Decl. Ex. B, Moore Dep., at 68:15-70:7.) When the
5 person selecting the EMS coding is not the same person that completed the
6 investigation worksheet, there is an additional potential for error or misinterpretation,
7 making the EMS data even less reliable than the meal period investigation worksheets
8 for the purpose of determining the actual reason for the meal exception.

9 Indeed, the EMS code sometimes bears no relationship to the associate's
10 explanation in Step 1 of the worksheet. (*See, e.g.*, Stokes Decl., ¶ 4 (Exs. 15-18), ¶ 6.)
11 For example, a December 2017 meal exception was coded as "Associate Failed to Punch
12 – No Timely Adjustment." (Stokes Decl., ¶ 4 (Ex. 15), ¶ 6.) But at Step 1 of the
13 corresponding investigation worksheet, the associate explains that he simply "lost
14 track of time." (Stokes Decl., ¶ 4, Ex. 15.)

15 Another worksheet in which an associate claims he "lost track of time" was coded
16 as "Manager Directed." (Stokes Decl., ¶ 4, Ex. 4.) This alone, according to Plaintiffs,
17 legally entitles the associate to a meal period premium. But employers are not liable
18 for meal period premiums merely because their employees "lost track of time" and took
19 a late lunch. *Li v. A Perfect Franchise, Inc.*, No. 5:10-CV-01189-LHK, 2011 WL
20 4635198, at *13 (N.D. Cal. Oct. 5, 2011) ("Case law interpreting the statute has
21 established that meal breaks need only be made available to employees, they don't
22 necessarily actually have to be taken"). The chart below summarizes several
23 additional examples of meal period exceptions that were coded as "Manager Directed"
24 even though the associate's explanation suggests otherwise.

Exhibit No. ³	Step 1 Explanation	Step 2 Selection(s)	EMS “Reason” Coding
Ex. 7 (Cabrera)	“MHRM came and toured with us and by the time we were done I had gone over my 5 th hour lunch break.”	Voluntary; “Associate Initiated Without Management Approval”	Manager Directed – No Coverage/For Customer Support
Ex. 8 (Cook)	“I went over my 10 th hour. Because, it was the last day of layaway and no one else was here to cover the register. Couldn’t leave the customer.”	Voluntary	Manager Directed – No Coverage/For Customer Support
Ex. 9 (Ortega)	“Preparing for inventory.”	Voluntary	Manager Directed – No Coverage/For Customer Support
Ex. 10 (Bustamante)	“Spoke to Edgar last chance & he will pay attention to his swipes & his time.”	Voluntary	Manager Directed – No Coverage/For Customer Support
Ex. 11 (Mora)	“Is because I need finish my work, and try to don’t do again.”	None	Manager Directed – No Coverage/For Customer Support
Ex. 12 (Reveles)	“Lost Time. The associate wasn’t sure that work with break/meal period.”	None	Manager Directed – No Coverage/For Customer Support
Ex. 13 (Wiggins)	“See ETA & Punch Log”	Voluntary; Associate Initiated Customer Support	Manager Directed – No Coverage/For Customer Support
Ex. 14 (Rowe)	“Busy in deli, Talked to assistant manager Jeremy about leaving early.”	None	Manager Directed – No Coverage/For Customer Support

Inconsistencies between the associate’s explanation and the EMS codes are not the only reason these documents cannot be used as a shortcut for determining meal period liability. In many other cases, *there is no corresponding worksheet at all*. (Stokes Decl., ¶ 7.) Where there is no corresponding worksheet, it is impossible to know whether the associate even *alleged* that the meal exception was “Manager Directed,” let alone whether it was *in fact* manager directed.

³ See Stokes Decl., ¶ 4, Exs. 7-14.

1 Other worksheets are ambiguous because they are either incomplete or too
2 vague to make any determinations about what *actually* happened. (See e.g., Winn
3 Decl. Ex. B, Moore Dep. 128:7-25; 129:1-18; 130:2-132:2; Stokes Decl., ¶ 4, Exs. 1, 2, 3.)

4 Plaintiff's counsel highlighted this very problem during Moore's deposition. For
5 example, after showing Moore an investigation worksheet with a Step 1 explanation of
6 "Helping customer on the floor," counsel asked Moore how that explanation should be
7 coded in the EMS system. (Winn Decl. Ex. B, Moore Dep. 127:18-128:6; Winn Decl. Ex.
8 C, Moore Dep. Ex. 77.) Moore explained: "I have no way to know how this should be
9 coded based solely on that – based solely on the comment written there." (Winn Decl.
10 Ex. B, Moore Dep. 128:4-6.) She also noted that the form was not completed properly:
11 "The instructions clearly say to place an X in one of those [boxes in Step 2], but I'm not
12 sure what -- it appears the form was not completed according to the instructions on the
13 form." (Winn Decl. Ex. B, Moore Dep., 128:7-25.)

14 Plaintiff's counsel then provided Moore with a second example. It too was
15 incomplete. This time, there was no Step 2 selection. (Winn Decl. Ex. B, Moore Dep.
16 129:1-18; Winn Decl. Ex. C, Moore Dep. Ex. 77.)

17 Plaintiff's counsel then showed Moore a third worksheet, and asked whether she
18 agreed that the worksheet should be coded as "Manager Directed." Moore explained:
19 "I don't have enough information, and the information on the form isn't clear. The
20 information on the form is inconsistent with the associate's punches. So at this point, I
21 would say I don't know that anything [regarding this exception] was manager-
22 directed." (Winn Decl. Ex. B, Moore Dep. 130:2-132:2; Winn Decl. Ex. D, Moore Dep.
23 Ex. 81.)

24 These exchanges highlight the challenges inherent in trying to use the
25 worksheet investigation documentation (and corresponding EMS data) for something it
26 was never designed to do: determine whether an associate was *legally* entitled to a
27 meal period premium. Because the meal period investigation worksheets are not
28 designed to determine whether someone was *legally* entitled to a meal period premium,

1 and because the EMS coding is *not* a “confirmation” of any actual violation, none of
 2 these documents can be used as a proxy to determine liability. This is especially true
 3 given the fact that the documentation is often ambiguous, incomplete, and/or
 4 inconsistent. As a result, determining whether any particular associate was *actually*
 5 entitled to a meal period premium would require individualized inquiries that go far
 6 beyond a review of EMS data or the underlying investigation worksheets.

7 **3. Because Walmart’s documents cannot easily identify who**
 8 **was legally entitled to a meal period premium, this case is**
 9 **no different than other meal break cases in which class**
 10 **certification is improper.**

11 Without some common policy or practice that prevents class members from
 12 taking a proper meal period—and there is no such allegation here—meal break claims
 13 are inherently ill-suited for class treatment. *See, e.g., Ochoa v. McDonald’s Corp.*, No.
 14 3:14-CV-02098-JD, 2016 WL 3648550, at *6 (N.D. Cal. July 7, 2016) (denying
 15 certification because plaintiffs “[did] not tender any evidence of a standard policy or
 16 practice, formal or informal, of denying crew members their meal and rest breaks”); *Li*,
 17 2011 WL 4635198, at *13 (“Whether class certification of a meal period claim is
 18 appropriate depends upon whether the employer has a uniform policy.”).

19 This is so because determining why any particular class member did not take a
 20 compliant meal period, on any particular day, inherently raises a host of individualized
 21 inquiries. *See, e.g., Wilson v. TE Connectivity Networks, Inc.*, No. 14-CV-04872-EDL,
 22 2017 WL 1758048, at *7 (N.D. Cal. Feb. 9, 2017) (denying certification of Plaintiffs’
 23 meal break claims and noting that courts “consistently” deny certification of meal
 24 break claims because individualized issues often predominate) (collecting cases)
 25 (citations omitted); *Li*, 2011 WL 4635198, at *13 (finding that common issues of law or
 26 fact do not predominate in plaintiffs’ meal break claims because “[a]bsent a uniform
 27 policy or practice, plaintiffs’ meal break claims will require a heavily factual inquiry
 28 into the particular circumstances of each putative class member to determine when, if
 ever, they were not permitted to take a meal break”).

1 It is no different here. The variety of reasons for meal exceptions are legion:
 2 (1) “I can’t remember [why],”⁴ (2) “[I] had car problems so I didn’t come back,”⁵ (3) “Was
 3 training new employee,”⁶ (4) “@Med Center,”⁷ (5) “I had bread in [the] oven,”⁸ and (6)
 4 “With a shoplifter.”⁹ Without examining each of these allegations individually, in
 5 context, there is no way to determine whether any of them give rise to an *actual*
 6 violation. And because the meal period premium claim cannot be adjudicated without
 7 first identifying which class members were legally entitled to a meal period, class
 8 treatment of the meal period premium claim is improper.

9 CONCLUSION

10 This Court certified Plaintiff’s meal period premium claim based on Plaintiff’s
 11 representation that Walmart’s investigation records would allow the Court to readily
 12 identify which associates were legally entitled to a meal premium. Because discovery
 13 has now shown that this assumption was incorrect and that determining who is legally
 14 entitled to a meal period premium will require individualized inquiries that will
 15 overwhelm any common questions, the Court should decertify the Meal Period
 16 Premium Class.

17 Dated: July 26, 2018

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 25 ⁴ (Stokes Decl., ¶ 4, Ex. 19).

26 ⁵ (Stokes Decl., ¶ 4, Ex. 20).

27 ⁶ (Stokes Decl., ¶ 4, Ex. 21).

28 ⁷ (Stokes Decl., ¶ 4, Ex. 22).

⁸ (Stokes Decl., ¶ 4, Ex. 23).

⁹ (Stokes Decl., ¶ 4, Ex. 24).